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IN THE

SUPREME COURT OF THE UNITED STATES

No. 76-787

UNITED STATES,
Respondent,

v.

FRED HARRY PRASSE,
Petitioner.

UNITED STATES,
Respondent,

v.

GEORGE JOSEPH LEBONICK,
Petitioner.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

JOINT PETITION FOR WRIT OF CERTIORARI

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Petitioners pray that a Writ of Certiorari be issued to review the judgments of the United States Court of Appeals for the Fifth Circuit entered in this cause on November 9, 1976 in Cause Nos. 76-1549 and 76-1550.

Inasmuch as both cases involve the same factual circumstances and identical issues relative to the search and seizure question, petitioners have proceeded by way of a joint petition.

OPINION BELOW

The opinions of the Court of Appeals are unpublished, but are appended hereto as Appendix A.

JURISDICTION

Both cases were argued before the Court of Appeals on October 19, 1976 and decisions were entered on November 9, 1976. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. May the "exigent circumstances" exception to the rule requiring a warrant for entry into defendant's hotel room, be applied where time and circumstances would have permitted the obtaining or a warrant prior to entry?

2. Does an instruction to the effect that one element of the offense has been established beyond a reasonable doubt invade the province of the jury even where the element is undisputed?

STATEMENT

Petitioners were tried separately and convicted of offenses involving the interstate transportation of stolen jewelry. Additionally, petitioner Prasse was convicted of carrying a pistol during the commission of the offense. Prior to trial both petitioners filed motions to suppress evidence and at the consolidated hearing on the motions the evidence indicated as follows.

F.B.I. Agent Petrakis had received a phone call on August 2, 1974, from Edward Humblestein indicating that someone offered to sell him stolen coins and jewels. (Appx. A-17).

Mr. Humblestein had been an informer with the F.B.I. for a number of years in connection with his operation of "gambling junkets" on behalf of the Dunes Hotel in Las Vegas from the Memphis area to Las Vegas, Nevada. (T. 12)

Agent Petrakis followed up on the information on August 6, 1974, upon his return to his office and received further information that petitioner Lebonick had contacted Humblestein and told him he had some jewelry and coins for sale that Humblestein could buy "real cheap." (Appx. A 19-20). Humblestein further stated that Lebonick elaborated concerning the jewelry and said it was from a burglary of the Famous-Barr Department Store in the St. Louis area. Lebonick told Humblestein that he, Lebonick, had contact with at least two of the individuals who were either involved in the burglary or had custody of the jewelry and that he, Lebonick, estimated the value of the jewelry at $125,000.00 for which Lebonick wanted $22,000.00 total price with the minimum of $11,000.00 down. (T. 14)

Following the receipt of that information on August 6, 1974, Agent Petrakis checked with St. Louis and determined that there had been, in fact, a burglary of the "Famous-Barr Department Store" and that there were several hundred dollars' worth of missing jewelry.

Subsequently Mr. Humblestein advised Agent Petriakis that Lebonick was going to bring the jewelry with him to Memphis, Tennessee, the next day. (T. 18).

Arrangements were made to surveil Mr. Lebonick's activities in St. Louis at the airport and upon his arrival in Memphis, Tennessee, by government agents. (T. 18, 19).

Lebonick was met at the Memphis Airport by Humblestein and carried to a nearby motel for lunch. During this lunch, Lebonick made several long distance phone calls to St. Louis

and as a result of information obtained, Humblestein learned and in turn advised Agent Petrakis, without Lebonick's knowledge, that one or more men would meet Lebonick and Humblestein at the Ramada Inn nearest the Memphis Airport at 5:00 p.m. The people who were to arrive with the jewelry would check in using the name "James P. Johnson". (T. 22, 23).

During the afternoon, the F.B.I. made arrangements with the motel for the arrival of persons in the name of "James P. Johnson" at the Ramada Inn and the management agreed to place those persons in Room 145. The F.B.I. had an agent upstairs and an agent next door in Room 143 waiting for the arrival of the persons that were to come from St. Louis with the jewelry. (T. 24).

Lebonick and Humblestein appeared at the Ramada Inn and waited until approximately 7:00 p.m. without any appearance of the additional people. At that time, Lebonick and Humblestein registered for a room in the name of "James P. Johnson" and were assigned to Room 145.

Mr. Humblestein had previously been instructed that in the event somebody did arrive with the jewelry that he was to examine it and if it appeared to be a large volume in excess of $5,000.00 and that he had, in fact, been apprised of the fact that it was stolen that he should place an order with room service for an exotic drink which would be a signal to the F.B.I. (T. 26).

At approximately 7:40 p.m. petitioner Prasse and an individual named Canada arrived at the motel and began to register in the name of James P. Johnson when they were greeted by Lebonick. (T. 27, 28).

The two men were observed to go in the trunk of the automobile and take out two brown cases and carry them into the motel room.

Thereafter, at approximately 8 p.m., Mr. Humblestein left the room and walked to the motel lobby where he conferred with one of the agents. Mr. Humblestein told this agent that the two men had arrived, that they had, in fact, two large cases of jewelry, and that in about fifteen minutes they would have it spread out all over the room and the bed. (T. 28). The agent with whom Mr. Humblestein spoke at that time, however, instructed him to return to the motel room.

Approximately fifteen minutes later, Mr. Humblestein placed the order for the "exotic drink" and shortly thereafter the F.B.I. knocked at the door and announced their presence as "room service". The door was opened and the agents entered and arrested all of the occupants without incident at approximately 8:30 p.m. (T. 29, 30).

After all persons were arrested, they were searched and petitioner Prasse was found to possess a .38 revolver and a pocket knife (T. 32). The F.B.I. seized the jewelry which was present in the room, and which was later introduced in evidence in the trial over objection. The denial of the motion to suppress evidence and the admission constitute the basis of the first assignment of error.

Agent Petrakis testified that the agents did not seek a warrant because they did not know that the crime had been consummated until the jewelry actually arrived and they were advised it was present in Memphis, Tennessee. In addition, according to a reservation Mr. Lebonick had for a return flight, he was to leave Memphis at 8:55 p.m. Finally, the agent testified he was concerned for the safety of Mr. Humblestein. (T. 2).)

There were approximately six or seven agents present at the site of the arrest and that there were no avenues of escape other than from the front door of the motel room. The agent admitted that the suspects in the motel room could not have fled

if they had sought to. (T. 26, 27). The contraband was such that it could not have been secreted or destroyed.

The evidence further disclosed that Mr. Humblestein upon exiting from the room was safely removed from any potential danger and had been allowed to return. At the point in time when Mr. Humblestein talked with the agent outside the room, he did not indicate that anyone was armed nor that there was any danger in the situation. (T. 40).

Agent Petrakis also testified that he had in the past made arrangements to have an agent standing by with the U. S. Magistrate after hours and to make a phone call to that agent and advise the agent by phone that certain acts had occurred. This agent would then present the Magistrate with that information for the issuance of warrants. (T. 52, 53).

Following his arrest, Lebonick was advised of his constitutional rights and gave a short and incomplete statement which was introduced over his objection at the trial of the case. The Court ruled, however, that if the arrest was illegal, the statement made in close proximity of time would be suppressible. (T. 57).

In response to arguments on behalf of petitioners both the trial court and the Court of Appeals found that the warrantless entry was not unreasonable and was justified by exigent circumstances.

During the trial of petitioner Prasse, the defense did not contest the evidence regarding the interstate transportation, the fact that the jewelry was stolen or the evidence indicating a value in excess of five thousand dollars. In fact, Mr. Prasse testified that he believed the jewelry to have been stolen from Famous-Barr, but that he became involved as a middleman in the disposition of the jewelry in an attempt to obtain information and collect the reward which had been offered.

Apparently in view of the posture of Prasse's defense the trial court instructed the jury as follows:

> In this case, the essential elements that must be proven are first that on or about August 7, 1974, transported from Missouri to Memphis, Tennessee, and the second element is that the value of the jewelry was in excess of five thousand dollars and the third element is that the time of the transportation in interstate commerce the defendant knew the jewelry was stolen. Another essential element to which must be proven is that the defendant had a specific intent or desire to disobey or disregard the law.
>
> *The Court instructs you that there is no dispute on the first three elements.* Namely, the defendant admits that he transported on or about August 7, 1974, in interstate commerce the defendant further admits that the value of the jewelry was in excess of five thousand dollars. Third, the defendant further admits that at the time he transported the jewelry from one state to another namely from Missouri to Tennessee, he knew, in fact, that it was stolen; therefore, *those elements are established beyond a reasonable doubt.* The defendant does dispute, however, the fourth element, namely whether the defendant acted willfully (Emphasis supplied) (T. VI 654-655).

On appeal petitioner Prasse contended that despite the posture of his defense, it was plain and reversible error for the trial court, in effect, to direct a verdict of guilty as to the first three elements of the offense. The Court of Appeals summarily dismissed this contention without comment.

REASONS FOR GRANTING THE WRIT

I. Guidance Is Needed From This Court as to What "Exigent Circumstances" Will Justify a Warrantless Entry and Search.

The decision of the trial court and court of Appeals justifying the warrantless entry and search of petitioners room appears to be direct conflict with the criteria set down by the District of Columbia Circuit in *Dorman v. United States*, 435 F.2d 385 D.C. Cir., 1970 where the Court stated:

> . . . the entry of a dwelling for arrest purposes without a warrant is per se unreasonable unless certain 'exigent circumstances' were present to justify the police in bypassing the magistrate. In other words, the warrantless entry of a dwelling to arrest was put on the same constitutional footing as warrantless entry of a dwelling for a search. *See*: Coolidge v. New Hampshire, 403 U.S. 443, at 454-455, 91 S. Ct. 2022, 29 L. Ed. 2d 564 (1971). Entry in both circumstances is per se unreasonable unless 'exigent circumstances' justify the failure to obtain a warrant.

The Dorman Court then went on to list seven considerations material to the determination of whether such "exigent circumstances" exist:

(1) Whether a grave offense is involved, particularly a crime of violence;

(2) Whether the suspect(s) is (are) reasonable believed to be armed;

(3) Whether there is a clear showing of probable cause;

(4) Whether there is a strong reason to believe that the suspect(s) is (are) in the dwelling;

(5) Whether there is a likelihood of escape if not swiftly apprehended;

(6) Whether there is a peaceable entry, as opposed to a "breaking"; and

(7) Whether the time of entry is day or night. (435 F.2d at 392-393).

When these seven considerations are juxtaposed against the facts of the instant case, it is readily apparent that no "exigent circumstances" can be said to exist.

Certainly the suspected offense involved was not a crime of violence. The F.B.I. was not dealing with a bank robbery, as in *United States v. Shye*, 492 F.2d 886 (6th Cir. 1974), or armed robberies as in both *Dorman v. United States, supra* and *Vance v. State of North Carolina*, 432 F.2d 984 (4th Cir. 1970).

There was no evidence received by the F.B.I. prior to their warrantless entry which would indicate that any of the known occupants of the motel room were armed. The fact that defendant had a pistol and knife on his possession at the time of his arrest cannot be used as a substitute for the complete lack of reasonable belief on the part of the F.B.I. that the occupants of the motel room were known to be armed and dangerous.

The likelihood of escape was severely minimized by the position and number of agents around the motel room. Moreover, the F.B.I. had the advantage of an informant who was able to relay to them the plans of the group. The F.B.I. was clearly in control of the situation. Any attempt on the part of the occupants to conceal or destroy the contraband could have been easily thwarted by the F.B.I. agents surrounding the scene.

The fact that the F.B.I. agents entered the motel room without confronting an armed resistance belies any attempt by the Government to characterize this situation as exigent.

Even if it is assumed that the F.B.I. had probable cause, such cause alone cannot be used to circumvent the need for a warrant. See e.g., *United States v. Lewis,* 504 F.2d 92, 100 (6th Cir., 1974) where the Court emphasized that "(n)o amount of probable cause can justify a warrantless search or seizure absent one of the exceptions. Coolidge v. New Hampshire, supra, 403 U.S. at 468, 91 S.Ct. 2022."

II. The Court of Appeals' Approval of the Trial Court's Partially Directed Verdict of Guilty Constitutes a Radical Departure From Pronouncements of This Court.

The trial court usurped the function and invaded the province of the jury when it instructed the jury ". . . there is no dispute on the first three elements . . . those elements are established beyond a reasonable doubt."

Admittedly petitioner Prasse did not contest the interstate transportation, the stolen nature of the jewels or the value and in fact testified that he did transport the jewels and believed them to be stolen and worth more than five thousand dollars. Nevertheless, this does not obviate the need for the jury to determine these factual issues.

However, the effect of the trial court's instruction was that a verdict was directed against defendant as to the first three elements of the offense for which he was charged. It is axiomatic that a trial judge has no power to direct a verdict of guilty. See *United Brotherhood of Carpenters and Joiners of America v. United States,* 330 U.S. 395, 408 (1947) where this Court stated that "a judge may not direct a verdict of guilty no matter how conclusive the evidence." This axiom has been followed religiously in such cases as *United States v. Garaway,* 425 F.2d 185 (9th Cir. 1970); *Mims v. United States,* 375 F.2d 135, 148 (5th Cir. 1967); *Edwards v. United States,* 286 F.2d 681 (5th

Cir. 1960); and *Buchanan v. United States,* 244 F.2d 916, 920 (6th Cir. 1957).

Moreover, the failure of the trial court to instruct on the elements of the offense has consistently been held to be plain error. In *Findley v. United States,* 362 F.2d 921-922 (10th Cir. 1966) the court found pain error under Rule 52 (b) of the Federal Rules of Criminal Procedure in that the failure to instruct on the necessary elements of the offense affected the substantial rights of the accused. Again in *Barnes v. United States,* 341 F.2d 189, 192 (5th Cir. 1965) the United States Court of Appeals found that it was plain error to fail to instruct on the issue of possession in a Dyer Act case.

Attention is also invited to *Roe v. United States,* 287 F.2d 435, 440 (5th Cir. 1961) where the United States Court of Appeals emphasized that "(t)he plea of not guilty puts all in issue, even the most patent truths. In our Federal System, the Trial Court may never instruct a verdict either in whole or in part." See also *United States v. Oquendo,* 490 F.2d 171, 165 (5th Cir. 1973).

The fact that defendant's counsel allowed this instruction to be read to the jury (T. V551) should not waive defendant's right to appeal as plain error the use of such an instruction, especially in light of the deeply entrenched repugnance of the judiciary towards directed verdicts in criminal cases. As with any other witness, the jury may elect to believe or not believe the testimony of the defendant or any portion thereof. The fact that defendant's own testimony may constitute evidence supporting an element of the offense does not authorize the court to take the determination of the element from the jury. Moreover in this case the defendant's testimony relative to the value of the jewelry may not even have qualified since he was not an expert in this area. Similarly, defendant's belief that the jewelry was stolen was based upon hearsay since he did not participate in the theft.

The question presented to this court then is whether or not a trial court may under any circumstances partially direct a verdict of guilty. It is submitted that this presents a substantial constitutional issue requiring the plenary consideration and opinion by this Court.

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should issue to review the judgments and opinions of the Court of Appeals.

Respectfully submitted,

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APPENDIX A

No. 76-1549

United States Court of Appeals
For the Sixth Circuit

United States of America,
Plaintiff-Appellee,

v.

Fred Harry Prasse,
Defendant-Appellant.

Order

(Filed November 9, 1976)

Before: WEICK, CELEBREZZE and ENGEL, Circuit Judges.

Appellant Fred H. Prasse was found guilty in a jury trial of transporting stolen property in interstate commerce in violation of 18 U.S.C. § 2314 and of carrying a firearm during the commission of a felony in violation of 18 U.S.C. § 924(c)(2). In his direct appeal Prasse claims that evidence obtained by means of a warrantless entry into a motel room wherein he was located was improperly introduced at his trial since the entry was unreasonable and not justified by exigent circumstances. He further claims that the trial court erred in its instructions to the jury and in allowing the prosecution to call an accomplice, George Lebonick, as a witness, knowing that he would invoke his privilege against self-incrimination. After a careful review of the record, the court concludes that the claims so asserted are without merit and, accordingly,

IT IS ORDERED that the judgment of the district court be and it is hereby affirmed.

Entered by Order of the Court.

/s/ JOHN P. HEHMAN
Clerk

APPENDIX B

No. 76-1550

United States Court of Appeals
For the Sixth Circuit

United States of America,
Plaintiff-Appellee,

v.

George Joseph Lebonick,
Defendant-Appellant.

Order

(Filed November 9, 1976)

Before: WEICK, CELEBREZZE and ENGEL, Circuit Judges.

In a jury trial in the district court, appellant George J. Lebonick was found guilty of a one-count indictment charging him with the interstate transportation of stolen property, in violation of 18 U.S.C. § 2314 and § 2. On his direct appeal Lebonick claims that a warrantless entry into his motel room was unreasonable *per se*, was unjustified by any exigent circumstances, and that in consequence evidence obtained as a result of that entry was improperly introduced at his trial. Appellant also claims that in the total context of the evidence, the court's charge and the final argument of the Assistant United States Attorney improperly emphasized his failure to testify in his own behalf. Upon a review of the record, the court is satisfied that the warrantless entry was not unreasonable and was justified by exigent circumstances. It further concludes that the charge of the court and the argument of the prosecution did not amount to any comment upon the defendant's failure to testify and were not otherwise improper in the circumstances. Accordingly,

IT IS ORDERED THAT the judgment of the district court be and it is hereby affirmed.

Entered by Order of the Court.

/s/ JOHN P. HEHMAN
Clerk